

CONSENT DECREE

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CONSENT DECREE

Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a complaint in this action concurrently with this Consent Decree alleging that Defendant, Cosmed Group, Inc. ("Cosmed") (EPA and Cosmed will be referred to collectively as the "Parties"), violated Section 112 of the Clean Air Act ("Act" or "CAA"), 42 U.S.C. § 7412, and certain requirements of the state implementation plan adopted by the State of Illinois ("Illinois SIP") approved by EPA under Section 110 of the CAA, 42 U.S.C. § 7410, and federally-enforceable under Section 113(b) of the Act, 42 U.S.C. § 7413(b).

The Complaint against Defendant alleges, pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), that Cosmed violated federal regulations, entitled *National Emissions Standards for Hazardous Air Pollutant Emissions from Ethylene Oxide Sterilizers*, promulgated under Section 112 of the Act, 42 U.S.C. § 7412, by failing to install pollution controls, meet applicable emission limits, conduct timely compliance testing, properly monitor pollution controls, provide timely and accurate notifications and reports to EPA, and maintain compliance records. The Complaint also alleges that Cosmed failed to obtain a valid state-issued operating permit as required by the Illinois SIP.

The violations alleged in the Complaint involve Cosmed's use of ethylene oxide ("EtO"), a volatile organic compound ("VOC") and hazardous air pollutant ("HAP") under Section 112 of the Act, as a sterilizing agent at six separate current and former Cosmed facilities nationwide. The facilities where the violations are alleged to have occurred are former Cosmed facilities located in Coventry, RI, Grand Prairie, TX, San Diego, CA, South Plainfield, NJ, and

Waukegan, IL, and a facility currently owned by Cosmed in Baltimore, MD (collectively, the "Facilities").

Defendant does not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint.

The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I, below, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 113(b) of the Act, 42 U.S.C. § 7413(b), and over the Parties. Venue lies in this District pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391(b), 1391(c), and 1395(a), because Defendant is located, and does business, in this judicial district, and some of the violations alleged in the Complaint are alleged to have occurred in this judicial district. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree or such action and over Defendant, and consents to venue in this judicial district.

2. For purposes of this Consent Decree, Defendant agrees that the Complaint

states claims upon which relief may be granted pursuant to Section(s) 110, 112, and 113(b) of the Act.

3. Notice of the commencement of this action has been given to the States of California, Illinois, Maryland, New Jersey, Rhode Island, and Texas, as required by Section 113(b) of the Act, 42 U.S.C. § 7413(b).

II. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the United States and upon Defendant and any successor or other entities or persons otherwise bound by law.

5. Any transfer of ownership or operation of one or more of the Facilities currently owned by Cosmed to any other person must be conditioned upon the transferee's agreement to undertake the obligations required by this Decree, as provided in a written agreement between Defendant and the proposed transferee, enforceable by the United States as third-party beneficiary of such agreement. At least 30 days prior to such transfer, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA Region I and any other EPA Region(s) in which any of the Facilities affected by the transfer are located, to the United States Attorney for the District of Rhode Island and the United States Attorney for any other district(s) in which any of the Facilities affected by the transfer are located, and to the United States Department of Justice, in accordance with Section XIV of this Decree (Notices). Any attempt to transfer ownership or operation of any of the

Facilities currently owned by Cosmed without complying with this Paragraph constitutes a separate violation of this Decree. No change in ownership, operation, or legal status of Defendant or transfer of ownership or operation of one or more of the Facilities currently owned by Cosmed shall release Defendant from its continued performance of all of its obligations under this Decree, including the obligations to perform the injunctive relief set out in Section V and Appendices A and B, below, or the obligations to perform the supplemental environmental project set out in Section VI and in Appendix C, below.

6. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

8. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- a. "Complaint" shall mean the complaint filed by the United States in

this action;

b. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto (listed in Section XXI);

c. "Day" shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;

d. "Defendant" shall mean Cosmed Group, Inc., as named in the Complaint;

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

f. The "Facilities" shall mean, collectively, the facility currently owned by Defendant at 4200 Boston Street in Baltimore, Maryland, and the facilities formerly owned by Defendant at 8 Industrial Drive in Coventry, Rhode Island; 3459 South Clinton Avenue in South Plainfield, New Jersey; 1160 Northpoint Boulevard in Waukegan, Illinois; 1175 Isuzu Parkway in Grand Prairie, Texas; and, 7685 Saint Andrews Avenue in San Diego, California. When referred to individually, each of the Facilities shall be identified by the state in which it is located, namely, the "Rhode Island Facility," the "New Jersey Facility," the "Maryland Facility," the "Illinois Facility," the "Texas Facility," and the "California Facility," respectively.

g. "Interest" shall mean interest at the rate specified in 28 U.S.C.

§ 1961;

- h. "Paragraph" shall mean a portion of this Decree identified by an arabic numeral;
- i. "Parties" shall mean the United States and Defendant;
- j. "Section" shall mean a portion of this Decree identified by a roman numeral; and,
- k. "United States" shall mean the United States of America, acting on behalf of EPA.

IV. CIVIL PENALTY

9. Within 30 days after the Effective Date of this Consent Decree, Defendant shall pay the sum of \$500,000 as a civil penalty. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with instructions to be provided to Defendant following lodging of the Consent Decree by the Financial Litigation Unit of the U.S. Attorney's Office for the District of Rhode Island. At the time of payment, Defendant shall simultaneously send written notice of payment and a copy of any transmittal documentation (which should reference DOJ case number 90-5-2-1-08115 and the civil action number of this case) to the United States in accordance with Section XIV of this Decree (Notices).

10. Defendant agrees to treat all payments made pursuant to this Section as civil penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), and further agrees not to use these payments in any way as, or in furtherance of, a tax deduction for Cosmed Group, Inc., or any of its corporate affiliates, under federal, state or local

law.

V. COMPLIANCE REQUIREMENTS

11. Defendant shall comply with maximum achievable control technology (“MACT”) requirements established under the CAA for new and existing EtO sterilizers, namely, the *National Emissions Standards for Hazardous Air Pollutant Emissions from Ethylene Oxide Sterilizers*, codified at 40 C.F.R. Part 63, Subpart O (“EtO MACT” or “Subpart O”), with respect to the Maryland Facility from the date of lodging.

12. Environmental Management System. Defendant shall develop and implement a comprehensive, compliance-focused Environmental Management System (“EMS”) covering all of the “EMS Facilities,” as described in the attached Appendix A. The EMS is specifically described in the Scope of Work attached hereto as Appendix A (“EMS SOW”), which is incorporated into, and fully enforceable under, this Decree. Defendant shall perform the EMS in accordance with the provisions of this Paragraph and the specifications and schedules set forth in the EMS SOW.

13. Nationwide Facility Audits. Defendant shall retain one or more independent third party audit firms to complete multi-media compliance audits of each of the “Audit Facilities,” as described in the attached Appendix B. The multi-media compliance audits are specifically described in the Scope of Work attached hereto as Appendix B (“Audit SOW”), which is incorporated into, and fully enforceable under, this Decree. Defendant shall complete the multi-media compliance audits in accordance with the provisions of this Paragraph and the specifications and schedules set forth in the Audit SOW. EPA acknowledges that, prior to

entering into this Consent Decree, Cosmed retained the environmental consulting firm of TRC Environmental ("TRC") and that TRC has completed certain work on behalf of Cosmed that may be relevant to certain requirements of the Audit SOW. EPA agrees that work required under the Audit SOW that has been completed by TRC at one or more of the Audit Facilities and in accordance with the Audit SOW need not be repeated to comply with the Audit SOW. To complete the requirements of the Audit SOW, Cosmed shall retain one or more third party audit firms (which may include TRC) that meet the criteria set forth in the Audit SOW. To comply with the Audit SOW, Cosmed shall include in the final Audit Report information resulting from TRC work, as applicable, and that of any other audit firm(s) retained to complete the requirements of the Audit SOW.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECT

14. Defendant shall implement the four (4) Supplemental Environmental Projects ("SEPs"), in accordance with the terms and schedules set out in this Consent Decree and in Appendix C and Attachments C-1, C-2, C-3, and C-4, which are attached to, incorporated into, and fully enforceable under, this Decree. All four of the SEPs shall be completed within three (3) years after entry of this Decree, each in accordance with the schedule set forth in Attachment C-1, C-2, C-3, or C-4, as applicable. The SEPs involve the elimination of substantial amounts of harmful air emissions from diesel and gasoline fueled vehicles and equipment. The SEPs are intended to yield significant environmental or public health benefits and are beyond the requirements of existing law. In implementing the SEPs, Defendant shall spend a total of \$1,000,000 in eligible SEP costs, as well as any and all escrow interest accrued. Eligible SEP

costs include the costs of planning and implementing the SEPs, but do not include Defendant's overhead, additional employee time and salary, administrative expenses, legal fees, and contractor oversight. Eligible SEP costs also do not include costs associated with developing and implementing the EMS or multi-media compliance audits under Section V of this Decree. Defendant agrees not to use these payments in any way as, or in furtherance of, a tax deduction for Cosmed Group, Inc., or any of its corporate affiliates, under federal, state or local law.

15. Defendant is responsible for the satisfactory completion of the SEPs in accordance with the requirements of this Decree. To have satisfactorily completed the SEPs Defendant shall have fully funded, and ensured completion of, the SEPs in accordance with this Consent Decree, Appendix C, and Attachments C-1, C-2, C-3 and C-4 hereto. "Fully fund" means establishing interest-bearing escrow accounts in the amounts specified for the SEPs according to the requirements of this Consent Decree, Appendix C, and Attachments C-1, C-2, C-3 and C-4 hereto.

16. With regard to the SEPs, Defendant certifies the truth and accuracy of each of the following:

a. That, to Cosmed's knowledge, all cost information provided to EPA in connection with EPA's approval of the SEPs is complete and accurate and represents a fair estimate of the costs necessary to implement the SEPs;

b. That, as of the date of executing this Decree, Defendant is not required to perform or develop the SEPs by any federal, state, or local law or regulation, nor is Defendant required to perform or develop the SEPs by agreement, grant, or as injunctive relief

awarded in any other action in any forum;

c. That the SEPs are not projects that Defendant was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;

d. That Defendant has not received, and is not negotiating to receive, credit for the SEPs in any other enforcement action; and,

e. That Defendant will not receive any reimbursement for any portion of the SEPs from any other person.

For certifications relating to the information referenced in Subparagraph a, above, Cosmed may place reasonable reliance on the accuracy of reports or other written information provided to it by EPA, state or local authorities, or entities under contract with Cosmed or with such authorities to implement the SEPs.

17. SEP Completion Report

a. Pursuant to the provisions of Appendix C hereto, Defendant shall submit a SEP Completion Report(s) to the United States, in accordance with Section XIV of this Consent Decree (Notices). For each of the SEPs, the SEP Completion Report shall contain the following information:

- i. A detailed description of the SEP as implemented;
- ii. A description of any problems encountered in completing the SEP and the solutions thereto;

- iii. An itemized list of all eligible SEP costs;
- iv. Certification that the SEP has been fully implemented pursuant to the provisions of this Decree or that the amounts set forth in Paragraph 14, above, and in Appendix C and Attachments C-1, C-2, C-3, and C-4 hereto have been exhausted prior to completion of one or more of the SEPs, in which case the certification shall set forth the extent to which each SEP has been implemented; and,
- v. A description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification of the benefits and pollutant reductions, if feasible).

18. EPA may, in its sole discretion, require information in Cosmed's possession, custody, or control in addition to that described in the preceding Paragraph, in order to determine the adequacy of SEP completion or eligibility of SEP costs.

19. After receiving the SEP Completion Report, the United States shall notify Defendant whether or not Defendant has satisfactorily completed the SEP. If the SEP has not been satisfactorily completed in accordance with all schedules, or if the amount expended on performance of the SEP is less than the amount set forth in Paragraph 14, above, Stipulated Penalties may be assessed under Section VIII of this Consent Decree.

20. Disputes concerning the satisfactory performance of the SEP and the amount of eligible SEP costs may be resolved under Section X of this Decree (Dispute Resolution). No other disputes arising under this Section shall be subject to Dispute Resolution.

21. Each submission required under this Section shall be signed by an official

with knowledge of the SEP and shall bear the certification language set forth in Paragraph 26, below. Notwithstanding the preceding sentence, any such submission may also be accompanied by an acknowledgment that certain information has been provided by EPA or another third party and, *provided* such third party information is identified with specificity, the certification accompanying that third party information may be modified to reflect that the official believes it to be true and correct.

22. Any public statement, oral or written, in print, film, or other media, made by Defendant making reference to any of the SEPs under this Decree shall include the following language, "This project was undertaken in connection with the settlement of an enforcement action, United States v. Cosmed Group, Inc., taken on behalf of the U.S. Environmental Protection Agency under the federal Clean Air Act."

VII. REPORTING REQUIREMENTS

23. Defendant shall submit the following reports:

a. Within 30 days after the end of each calendar-year quarter (i.e., by April 30, July 30, October 30, and January 30) after lodging of this Consent Decree, until termination of this Decree pursuant to Section XVIII, Defendant shall submit by overnight delivery a quarterly report for the preceding quarter that shall include a discussion of Defendant's progress in satisfying its obligations in connection with the EMS, facility audits, and SEPs under Sections V and VI of this Decree including, at a minimum, a narrative description of activities undertaken, compliance with the schedules or milestones set forth in Sections V and VI of this Consent Decree and Appendices A, B, and C to this Decree, and, for the SEPs, a summary of

costs incurred since the previous report.

b. If Defendant violates, or has reason to believe that it may violate, any requirement of this Consent Decree, Defendant shall notify the United States of such violation and its likely duration in writing within ten working days of the day Defendant first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, and/or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendant shall include a statement to that effect in the report. Defendant shall investigate to determine the cause of the violation and then shall submit an amendment to the report, including a full explanation of the cause of the violation, within 30 days of the day Defendant becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the requisite notice for purposes of Section IX (Force Majeure).

24. In the case of any violation or other event that may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but not later than 24 hours after Defendant first knew of, or should have known of, the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

25. All reports shall be submitted to the persons designated in Section XIV of this Consent Decree (Notices).

26. Each report submitted by Defendant under this Section shall be signed by a duly authorized Cosmed official and shall include the following certification:

"I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate and complete."

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

27. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the Clean Air Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

28. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VIII. STIPULATED PENALTIES

29. If Defendant fails to pay the civil penalty required to be paid under Section IV of this Decree (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$5,000 per day for each day that the payment is late, together with Interest from the date when payment was due. Late payment of the civil penalty shall be made in accordance with Section IV, Paragraphs 9 and 10, above. Stipulated Penalties shall be paid in accordance with Section VIII, Paragraph 37, below. All transmittal correspondence shall state that any such payment is for late

payment of the civil penalty due under this Decree, or for Stipulated Penalties for late payment, as applicable, and shall include the identifying information set forth in Paragraph 9, above.

30. Defendant shall be liable for Stipulated Penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

31. Compliance Milestones

a. The following Stipulated Penalties shall accrue per violation per day for each violation of the requirements identified in Subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$2,000	31st day and beyond

b. EMS and facility audit requirements to which the penalties specified in Subparagraph a, above, apply include the following: (i) Defendant's submission of the EMS Manual, EMS Audit Plan, Audit Report, Action Plan, and Action Plan Completion Certification, as described in Appendix A; and, (ii) Defendant's submission of the Audit Work Plan, Audit Report, and Statement listing non-compliance items along with actions taken to remedy them, as described in Appendix B.

32. Reporting Requirements. The following Stipulated Penalties shall accrue per violation per day for each violation of the reporting requirements of Paragraph 5, above, and Section VII of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$750	15th through 30th day
\$1,000	31st day and beyond

33. SEP Compliance

a. In all cases, if by sixty (60) days after three (3) years from entry of the Consent Decree, Defendant has authorized the release from the escrow accounts required by Appendix C and Attachments C-1, C-2, C-3, and C-4 of less than the amount of \$1,000,000 in eligible SEP costs plus any and all escrow interest accrued, as set forth in Paragraph 14, Defendant shall pay a stipulated penalty equal to the difference between the amount of total eligible SEP costs Cosmed authorized for release from the escrow accounts and the amount set forth in Paragraph 14.

b. If Defendant fails to establish one or more interest-bearing SEP escrow accounts or to fund them, within sixty (60) days after entry of the Consent Decree, at the amounts specified herein, or if Defendant halts or abandons SEP implementation activities required by this Consent Decree, Appendix C, and any attachment to Appendix C, Defendant shall pay a stipulated penalty equal to twice the amount of the difference between the total amount of eligible SEP costs incurred by Defendant and the amount set forth in Paragraph 14.

The penalty under this Subparagraph is in addition to any penalty owed under Subparagraph a, above, and any penalties owing under Subparagraph d, below, for reporting deadlines missed up to the time that the penalty under this Subparagraph accrues. The penalty under this Subparagraph shall accrue as of the date establishment and funding of the escrow account is due or the date SEP implementation ceases, whichever applies.

c. For each SEP specified in this Consent Decree, Appendix C, and Attachments C-1 through C-4 hereto, if Defendant has completed the SEP, but EPA determines that the SEP is not completed satisfactorily, Defendant shall pay a stipulated penalty equal to 10% of the total amount initially required to fully fund the escrow account for that SEP, in addition to any other stipulated penalties required under Paragraph 33. Notwithstanding the previous sentence, for each SEP specified in this Decree, Appendix C, and Attachments C-1 through C-4, if EPA determines, pursuant to the requirements of this Consent Decree, Appendix C, and Attachments C-1 through C-4, that Defendant made good faith and timely efforts to complete the SEP and Defendant certifies, with supporting documentation, that at least 90 percent of the amount of eligible SEP costs which were required to be spent were expended on the SEP, Defendant shall not be liable for any stipulated penalty under this Subparagraph, and any remaining balance in escrow shall be paid to the United States in accordance with Subparagraph a, above, and Paragraph 37.

d. If Defendant fails to comply with the schedule for submitting any SEP Completion Report or any quarterly SEP report regarding implementation of an SEP or fails to comply with the schedule for establishing fully funded escrow accounts, as required under this

Consent Decree , Appendix C, or any attachment to Appendix C, Defendant shall pay Stipulated Penalties for each such failure to report or fully fund, as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$2,000	31st day and beyond

Such penalties shall accrue from the date Defendant was required to submit each SEP report or fully fund each escrow account until the relevant report is submitted or escrow account funded.

34. Subject to the provisions of Paragraph 33(a)-(c), above, Stipulated Penalties under this Section shall begin to accrue on the day after performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated Penalties shall accrue simultaneously for separate violations of this Consent Decree. Defendant shall pay any Stipulated Penalty within 30 days of receiving the United States' written demand.

35. The United States may, in the unreviewable exercise of its discretion, reduce or waive Stipulated Penalties otherwise due it under this Consent Decree.

36. Stipulated Penalties shall continue to accrue as provided in Paragraph 34, above, during any Dispute Resolution, with Interest, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing,

together with Interest, to the United States within 30 days of the effective date of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with Interest, within 60 days of receiving the Court's decision or order, except as provided in Subparagraph c, below;

c. If any Party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with Interest, within 15 days of receiving the final appellate court decision.

37. Defendant shall, as directed by the United States, pay Stipulated Penalties owing to the United States by EFT in accordance with Section IV, above or by certified or cashier's check in the amount due payable to the "U.S. Department of Justice," referencing DOJ No. 90-5-2-1-08115 and United States Attorney's Office file number 2003V00204, and delivered to the office of the United States Attorney, District of Rhode Island, Financial Litigation Unit, Fleet Center, 50 Kennedy Plaza, 8th Floor, Providence, RI 02903.

38. Defendant agrees to treat all stipulated penalty payments made pursuant to this Section as civil penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), and further agrees not to use these payments in any way as, or in furtherance of, a tax deduction for Cosmed Group, Inc., or any of its corporate affiliates, under federal, state or local law.

39. If Defendant fails to pay Stipulated Penalties according to the terms of this

Consent Decree, Defendant shall be liable for Interest on such penalties, accruing as of the date payment became due.

40. Subject to the provisions of Section XII of this Consent Decree (Effect of Settlement/Reservation of Rights), the Stipulated Penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Defendant's violation of this Consent Decree or applicable law.

IX. FORCE MAJEURE

41. A "force majeure event" is any event beyond the control of Defendant, its contractors, or any entity controlled by Defendant that delays the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. "Best efforts" includes anticipating any potential force majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree. The provisions of this Section IX of the Consent Decree shall not apply to violations disclosed pursuant to any environmental audit carried out under Appendix B of this Decree.

42. Defendant shall provide notice orally or by electronic or facsimile transmission as soon as possible, but not later than 72 hours after the time Defendant first knew of, or by the exercise of due diligence, should have known of, a claimed force majeure event. Defendant shall also provide written notice, as provided in Section XIV of this Consent Decree (Notices), within seven days of the time Defendant first knew of, or by the exercise of due

diligence, should have known of, the event. The notice shall state the anticipated duration of any delay; its cause(s); Defendant's past and proposed actions to prevent or minimize any delay; a schedule for carrying out those actions; and Defendant's rationale for attributing any delay to a force majeure event. Failure to provide oral and written notice as required by this Paragraph shall preclude Defendant from asserting any claim of force majeure.

43. If the United States agrees that a force majeure event has occurred, the United States may agree to extend the time for Defendant to perform the affected requirements for the time necessary to complete those obligations. An extension of time to perform the obligations affected by a force majeure event shall not, by itself, extend the time to perform any other obligation. Where the United States agrees to an extension of time, the appropriate modification shall be made pursuant to Section XVIII of this Consent Decree (Modification).

44. If the United States does not agree that a force majeure event has occurred, or does not agree to the extension of time sought by Defendant, the United States' position shall be binding, unless Defendant invokes Dispute Resolution under Section X of this Consent Decree. In any such dispute, Defendant bears the burden of proving, by a preponderance of the evidence, that each claimed force majeure event is a force majeure event; that Defendant gave the notice required by Paragraph 42; that the force majeure event caused any delay Defendant claims was attributable to that event; and that Defendant exercised best efforts to prevent or minimize any delay caused by the event.

X. DISPUTE RESOLUTION

45. Unless otherwise expressly provided for in this Consent Decree, the

dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to violations disclosed pursuant to an environmental audit carried out under Appendix B of this Decree. Such procedures also shall not apply to actions by the United States to enforce obligations of the Defendant that have not been disputed in accordance with this Section.

46. Informal Dispute Resolution. Any dispute subject to dispute resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed thirty days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

47. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not necessarily be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

48. The United States shall serve its Statement of Position within sixty days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall

include, but may not necessarily be limited to, any factual data, analysis, or opinion supporting that position and all supporting documents relied upon by the United States. The United States' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

49. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIV of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within ten days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

50. The United States shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

51. In any dispute under this Section X, Defendant shall bear the burden of demonstrating that its position clearly complies with this Consent Decree and the Clean Air Act and that Defendant is entitled to relief under applicable law. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious or otherwise not in accordance with law.

52. The invocation of dispute resolution procedures under this Section shall

not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated Penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 36, above. If Defendant does not prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

XI. INFORMATION COLLECTION AND RETENTION

53. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry to any facility covered by this Consent Decree, at all reasonable times and upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by Defendant or its representative, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data, consistent with the procedures in Paragraph 56 for asserting a privilege claim; and,
- e. assess Defendant's compliance with this Consent Decree.

54. Upon request, Defendant shall provide EPA or its authorized representatives splits of any samples taken by Defendant. Upon request, EPA shall provide

Defendant splits of any samples taken by EPA. Upon request, EPA also shall provide Defendant with copies of any documentary evidence such as photographs or similar data obtained pursuant to Subparagraph 53.d, above. Such documentary evidence or similar data shall not include EPA-generated materials such as inspection notes, draft reports, or other deliberative or enforcement sensitive information.

55. Until four years after the termination of this Consent Decree, Defendant shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all records and documents (including records or documents in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendant's performance of its obligations under this Consent Decree. This record retention requirement shall apply regardless of any corporate or institutional document-retention policy to the contrary. At any time during this record-retention period, the United States may request copies of any documents or records required to be maintained under this Paragraph.

56. At the conclusion of the document-retention period provided in the preceding Paragraph, Defendant shall notify the United States at least 90 days prior to the destruction of any records or documents subject to the requirements of the preceding Paragraph, and, upon request by the United States, Defendant shall deliver any such records or documents to EPA. Defendant may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (1) the title of the document, record, or

information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant. However, no documents, reports, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged.

57. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain records or information imposed by applicable federal or state laws, regulations, or permits.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

58. This Consent Decree resolves all civil claims of the United States under Section 113 of the Act for the violations alleged in the Complaint filed in this action, through the date of lodging of this Consent Decree with the Court.

59. Except as expressly specified herein, this Consent Decree shall not be construed to prevent or limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions including, without limitation, violations disclosed pursuant to any environmental audit carried out under Appendix B of this Decree.

60. Defendant is responsible for achieving and maintaining complete

compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to said laws, regulations, or permits. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Decree will result in compliance with provisions of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*

61. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

62. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

63. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated herein. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, one or more of the Facilities, whether related to the violations addressed in this Consent Decree or otherwise.

XIII. COSTS

64. The Parties shall bear their own costs of this action, including attorneys'

fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any Stipulated Penalties due but not paid by Defendant.

XIV. NOTICES

65. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611
Re: DOJ No. 90-5-2-1-08115

To EPA:

Rebecca Lynn Kurowski, Environmental Engineer
U.S. Environmental Protection Agency
Region 1 - New England
One Congress Street
Suite 1100 (Mail Code SEA)
Boston, MA 02114-2023

and

Hugh W. Martinez, Senior Enforcement Counsel
U.S. Environmental Protection Agency
Region 1 - New England
One Congress Street
Suite 1100 (Mail Code SEL)
Boston, MA 02114-2023

To Defendant:

David G. Howe, Vice President of Operations
Cosmed Group, Inc.
28 Narragansett Avenue
Jamestown, RI 02835

and

Todd R. Wiener, Esquire
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5096

66. Any Party may, by written notice to the other Party, change its designated notice recipient or notice address provided above.

67. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, by certified mail or overnight delivery, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XV. EFFECTIVE DATE

68. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XVI. RETENTION OF JURISDICTION

69. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections X and XVII, or effectuating or enforcing compliance with the terms of this Decree.

XVII. MODIFICATION

70. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by the Parties. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court. Notwithstanding the above, the terms and schedules contained in Appendices A - C of this Decree may be modified upon written agreement of EPA and Defendant, without Court approval, unless any such modification effects a material change to the terms of this Consent Decree or materially affects the Defendant's ability to meet the requirements of this Decree.

XVIII. TERMINATION

71. After Defendant has maintained continuous satisfactory compliance with this Consent Decree for a period of four (4) years after the Effective Date of this Consent Decree, has complied with all other requirements of this Consent Decree, including those relating to the EMS and compliance audits required by Section V and Appendices A and B of the Decree and to the SEPs required by Section VI and Appendix C of the Decree, and has paid the civil penalty and any accrued Stipulated Penalties as required by this Consent Decree, Defendant may serve upon the United States a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

72. Following receipt by the United States of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be

terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

73. If the United States does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section X of this Decree. However, Defendant shall not seek Dispute Resolution of any dispute, under Paragraph 47 (formal dispute resolution) of Section X, until at least 90 days after service of its Request for Termination.

XIX. PUBLIC PARTICIPATION

74. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice.

XX. SIGNATORIES/SERVICE

75. Each undersigned representative of Defendant, EPA, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

76. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis.

77. Defendant agrees not to oppose entry of this Consent Decree by the Court

or to challenge any provision of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

78. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXI. INTEGRATION/APPENDICES

79. This Consent Decree and its Appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersede all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than the Appendices, which are attached to and incorporated in this Decree, and submittals that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XXII. FINAL JUDGMENT

80. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

XXIII. APPENDICES

81. The following appendices are attached to and incorporated into this

Consent Decree:

“Appendix A” is the Scope of Work for the Environmental Management System;

“Appendix B” is the Scope of Work for the Multi-Media Compliance Audits; and,

“Appendix C” is the Scope of Work for the Supplemental Environmental Projects.

Dated and entered this ___ day of _____, 2005.

UNITED STATES DISTRICT JUDGE
District of Rhode Island

FOR PLAINTIFF UNITED STATES OF AMERICA:

DATE: 8/8/05

KELLY A. JOHNSON)
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

DATE: 8/11/05

HUGH W. MARTINEZ
DOJ Special Attorney
Environmental Enforcement Section
Environment and Natural Resources Division

EPA Region 1 - New England
Office of Environmental Stewardship
One Congress Street
Suite 1100 (Mail Code SEL)
Boston, MA 02114-2023
(617) 918-1867

ROBERT CLARK CORRENTE
United States Attorney
District of Rhode Island

DATE: _____

MICHAEL P. IANNOTTI
Assistant United States Attorney
District of Rhode Island
50 Kennedy Plaza, 8th Floor
Providence, Rhode Island 02903
(401) 709-5000

DATE: 8/03/05

STEPHEN S. PERKINS, Director
Office of Environmental Stewardship
United States Environmental Protection Agency
EPA Region 1 - New England

DATE: 8-3-05

HUGH W. MARTINEZ
Senior Enforcement Counsel
EPA Region 1 - New England

DATE: Aug. 11, 2005

KATHLEEN C. CALLAHAN
Acting Regional Administrator
United States Environmental Protection Agency
EPA Region 2

DATE: 7/26/85

DONALD S. WELSH
Regional Administrator
United States Environmental Protection Agency
EPA Region 3


DATE: 7/25/85

WILLIAM C. EARLY
Regional Counsel
United States Environmental Protection Agency
EPA Region 3


DATE: 7/26/85

for DENNIS M. ABRAHAM
Senior Assistant Regional Counsel
EPA Region 3

DATE: 8/8/05

 BHARAT MATHUR
Acting Regional Administrator
United States Environmental Protection Agency
Region 5

DATE: 8.5.05

 JOANNA GLOWACKI
Associate Regional Counsel
EPA Region 5

DATE: _____

RICHARD E. GREENE
Regional Administrator
United States Environmental Protection Agency
Region 6

DATE: Aug 15, 2005

WAYNE NASTRI
Regional Administrator
United States Environmental Protection Agency
EPA Region 9

U.S. v. Cosmed Group, Inc.
CONSENT DECREE

DATE: 8/10/05

THOMAS V. SKINNER

Acting Assistant Administrator
United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance

FOR DEFENDANT COSMED GROUP, INC.:

DATE: 8/1/05

DR. MICHAEL L. HOWE
President and CEO
Cosmed Group, Inc.
28 Narragansett Avenue
Jamestown, RI 02835
(401) 423-2003